

Date Issued: January 22, 1999
Case Nos.: 1997-ERA-24 & 1997-ERA-62

In the Matter of:
DEWEY RAY SMITH, JR.
Complainant

v.

TENNESSEE VALLEY AUTHORITY,
Respondent

RECOMMENDED DECISION AND ORDER

The above-captioned case arises under the provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1988 and Supp. V 1993), and its implementing regulations at 29 C.F.R. Part 24. The rules provided at 29 C.F.R. Part 18 shall apply to this proceeding except as modified by 29 C.F.R. Part 24. On January 4, 1999, the parties submitted a joint motion for dismissal seeking to dismiss the claim. Attached to the motion is the memorandum of understanding and agreement which is signed by counsel for both parties, as well as the complainant, to which they seek approval and wish to protect its confidentiality.

This recommended decision and order will constitute the final order of the Secretary of Labor unless appealed to the Administrative Review Board. *Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes*, 63 Fed. Reg. 6614, 6620 (February 9, 1998)(to be codified at 29 C.F.R. § 24.7). Therefore, it is my responsibility to determine whether the terms of the settlement agreement are a fair, adequate and reasonable settlement of the complaint. *See* 29 C.F.R. § 24.6; *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Dep't. of Labor*, 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, March 23, 1989, slip op. at 1-2.

My review of the memorandum of understanding and agreement leads me to conclude that it may encompass the settlement of matters under laws other than the ERA. *See* Memorandum of Understanding and Agreement ¶ 4. As explained by the Administrative Review Board in *Poulos v. Ambassador Fuel Co. Inc.*, Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op. at 2:

[The Secretary's] authority over settlement agreements is limited to such statutes as are within [the Secretary's] jurisdiction and is defined by the applicable statute. *See Aurich v. Consolidated Edison Co. of New York, Inc.*, Case No. [86-] CAA-2, Secretary's Order Approving Settlement, issued July 29, 1987; *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Secretary's Order on Remand, issued November 3, 1986.

I have therefore limited my review of the memorandum to determine whether the terms are a fair, adequate and reasonable settlement of Complainant's allegations that the Respondent violated the ERA and other Federal employee protection statutes under my jurisdiction.

Paragraph 6 of the memorandum essentially provide that the terms of the agreement shall be kept confidential, except as required by law. This settlement agreement will become part of the administrative record before the Secretary of Labor and the Secretary will treat this settlement agreement pursuant to 29 C.F.R. § 70.26. That regulatory section pertains to predisclosure notification to submitters of confidential commercial information. The parties stipulate that this memorandum is privileged and has "confidential" "commercial" and "financial" information. The parties agree not to oppose any request by TVA that DOL regard this agreement as confidential commercial information or any request by TVA to DOL to provide predisclosure notification, pursuant to 29 C.F.R. § 70.26 (1997), in the event that it receives a Freedom of Information Act request for this agreement.

The Administrative Review Board has held in a number of proceedings with respect to the confidentiality provisions and settlement agreements that the Freedom of Information Act, 5 U.S.C. § 552 (1988) (FOIA) "requires agencies to disclose requested documents unless they are exempt from disclosure" *Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspection Services*, ARB Case No. 96-141, Final Order Approving Settlement Agreement and Dismissing Complaint, June 24, 1996, slip op. at 2-3; *see also Plumlee v. Alyeska Pipeline Services Co.*, Case Nos. 92-TSC-7, 10; 92-WPC-6, 7, 8, 10, Secretary Final Order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 6; *Davis v. Valley View Ferry Authority*, Case No. 93-WPC-1, Secretary Final Order Approving Settlement and Dismissing Complaint, Jun. 28, 1993, slip op. at 2 n.1 (parties' submissions become part of record and are subject to the FOIA); *Ratliff v. Airco Gases*, Case No. 93-STA-5, Secretary Final Order Approving Settlement and Dismissing Complaint with Prejudice, Jun. 25, 1993, slip op. at 2. As explained by the Administrative Review Board in *Paine v. Saybolt, Inc.*, ARB Case No. 97-136, Final Order Approving Settlement and Dismissing Complaint, Sept. 5, 1997, slip op. at 2:

The records in this case are agency records which must be made available for public inspection and copying under the FOIA. In the event a request for inspection and copying of the record in this case is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no

exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such exemption and withhold the requested information. It would also be inappropriate to decide such questions in this proceeding.

Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requesters from denials of such requests, and for protecting the interests of submitters of confidential commercial information. *See* 29 C.F.R. Part 70 (1995). [endnote omitted.]

I therefore recommend approval of this memorandum with the understanding the Department of Labor will address the parties' request under 29 C.F.R. § 70.26, in the event a Freedom of Information Request is filed.

The Administrative Review Board requires that all parties seeking approval of a settlement agreement arising under ERA provide the settlement documentation for any other alleged claim arising from the same factual circumstances forming the basis of the federal claim or to certify that no other settlement agreements were entered into by the parties. *Biddy v. Ayleska Pipeline Service Co.*, ARB Case Nos. 96-109, 97-1015, Final Order Approving Settlement and Dismissing Complaint, Dec. 3, 1996, slip op. at 3. Therefore, the parties have acknowledged that the memorandum of understanding and agreement constitutes the only agreement between the parties.

I find that the memorandum is a fair, adequate and reasonable settlement of the complaint involved in this proceeding. Therefore,

IT IS HEREBY RECOMMENDED that the joint motion for dismissal to dismiss the claim, together with the memorandum of understanding and agreement, be granted.

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).